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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BARTON RHETT WILLIAMS, Defendant and Appellant.	H042903 (Santa Clara County Super. Ct. No. C1230617)

Defendant Barton Rhett Williams appeals following his conviction by a jury of first degree murder. On appeal, he raises claims of instructional error, prosecutorial misconduct, ineffective assistance of counsel, and cumulative error. He also contends the trial court erred in determining that two out-of-state convictions were strikes for purposes of the Three Strikes Law. We shall affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Santa Clara County District Attorney charged defendant with murder (Pen. Code, § 187)[1] and alleged that he had personally inflicted great bodily injury within the meaning of sections 667 and 1192.7. The first amended information also alleged that defendant had sustained two prior strike convictions (§§ 667, subd. (b)-(i), 1170.12)—a first degree burglary conviction in violation of Oregon Revised Statute section 164.225

[1] All further statutory citations are to the Penal Code unless otherwise indicated.

and robbery in violation of Oregon Revised Statute section 164.405.[2] It further alleged that the Oregon robbery conviction constituted a serious felony conviction (§ 667, subd. (a)) and that defendant had served a prison prior term in California (§ 667.5, subd. (b)).

The case proceeded to a jury trial in late 2014. The following evidence was adduced at trial.

Late on the night of April 16, 2012, Witwas Lee Shugan walked to his parked car after leaving work at the Thai restaurant he owns in downtown San Jose. As he entered the parking lot at 35 South Second Street, defendant approached him and asked him to call 911. Shugan saw flames and realized a woman was on fire. Shugan notified the parking attendant, Terrence Cruz, who called 911. That call came in at 11:43 p.m. Cruz threw water on the flames to put them out.

The victim was sixty-four-year-old Patricia Storey, defendant's wife. Storey was alive when paramedics arrived, despite extensive and horrific injuries. She had sustained burns to 78 percent of her body, many of them third and fourth degree. Storey's treating physician at Santa Clara Valley Medical Center testified that Storey's burns were some of the worst the doctor had ever seen and were not survivable. Story died from her injuries at 2:00 p.m. on April 17th. The assistant medical examiner who conducted Storey's autopsy identified her cause of death as thermal and inhalation injuries due to engulfment in fire.

San Jose police officers Mike Waara and Adam Nyein were among the first responders. Each independently interviewed defendant at the scene and recordings of those interviews were played for the jury.

Defendant told Officer Waara he and his wife bought two pints of vodka at 7:30 or

[2] The information was later amended to allege that defendant had been convicted of third degree robbery in violation of Oregon Revised Statute section 164.395, not of violating Oregon Revised Statute section 164.405, which is second degree robbery.

8:00 p.m. that night and came to the parking lot. At some point, he lit a cigarette for her and then walked to the Safeway to buy a soda. When he returned 15 to 20 minutes later, she was on fire. Defendant said she must have passed out with the cigarette. Defendant told Officer Nyein a similar story.

The incident was captured on the parking lot's surveillance video, which was played at trial. According to witness testimony describing the video, it showed defendant and Storey sitting towards the back of the parking lot. Storey was in a chair with her back to the camera; defendant was sitting on some steps in front of her. The video showed several small flashes of light originate in defendant's lap and move onto Storey's lap. Then smoke became visible, followed by large flames engulfing Storey. Nearly three minutes after the flames became visible on Storey, the video showed defendant using a blanket to smother the fire.

Officers arrested defendant on April 18th after viewing the surveillance video.

Arson investigator Sandra Wells determined that the fire originated in Storey's lap and that it was a quick burning fire, which is not consistent with a dropped cigarette.

Karen Froming, M.D., a clinical neuropsychologist, testified for the defense as an expert in neuropsychology and the effects of substance abuse and alcohol on the brain. Dr. Froming testified that she met with defendant five times, with each session lasting several hours, to interview him and conduct testing. She opined that defendant suffers from various neuropsychological deficits, including slow processing speed, poor strategic planning, and attentional problems. She further testified that he suffers from severe alcohol dependence and had been a chronic abuser of alcohol for 20 years. Dr. Froming opined that a person with deficits like defendant's—delayed processing speed and strategic planning problems—might approach something like a person on fire in a "haphazard" and illogical way despite having good intentions.

In closing, the prosecution argued two theories of first degree murder—premeditated murder and felony murder. As to felony murder, the trial court instructed

the jury: "The defendant is charged with murder under a theory of felony murder. To prove that the defendant is guilty of first degree murder under this theory the People must prove that, one, the defendant committed arson of property. Two, the defendant specifically intended to commit arson of property. And three, while committing arson of property, the defendant caused the death of another person. [¶] A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent. . . . The defendant must have intended to commit the felony of arson of property before or at the time that he caused the death."

On December 22, 2014, after deliberating for approximately 30 minutes, the jury returned a verdict of guilty of first degree murder.

On July 14, 2015, following a bench trial on priors, the trial court granted the prosecution's request to amend the information to allege that the Oregon burglary conviction constituted a serious felony conviction (§ 667, subd. (a)) and concluded that the prior Oregon convictions qualified as strikes under the Three Strikes Law.

The trial court sentenced defendant on September 25, 2015. The court imposed a term of 85 years to life, consisting of an indeterminate term of 75 years to life on the murder conviction plus an additional 10-year term for the two section 667, subdivision (a) enhancements. The court struck the prison prior (§ 667.5(b)) pursuant to section 1385.

Defendant timely appealed.

II. DISCUSSION

A. Felony Murder Instructions

Defendant contends the trial court erred in instructing the jury on felony murder because the underlying felony—arson—was merely incidental to the killing. Specifically, he says there was no evidence he harbored an intent to commit arson separate from any intent to kill, such that the theory of felony murder was inapplicable and the instruction at issue was unsupported by substantial evidence. Alternatively,

defendant says the instruction was incomplete in that jurors were not informed that they could not convict him of felony murder if they concluded that the arson was merely incidental to the killing. The People respond that defendant forfeited his challenge, which, in any event, fails because the rule on which he relies applies only in the context of a felony-murder special circumstance allegation.

1. Forfeiture

Defendant failed to object to the felony murder instruction below. The People contend he thereby forfeited his claim of instructional error. We reach the merits of defendant's claim despite the lack of objection for two reasons. First, defendant contends the error affected his "substantial rights," such that the instruction is reviewable "even though no objection was made . . . in the lower court . . . ." (§ 1259.) "Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) Second, defendant asserts his trial counsel rendered ineffective assistance by failing to object. To resolve that claim, we must address the merits of the issue.

2. Standard of Review

"It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) "Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that . . . is . . . predominantly legal. As such, it should be examined without deference." (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) In other words, our review of the claimed instructional error is de novo. (*People v. Johnson* (2016) 6 Cal.App.5th 505, 509-510.)

3. Legal Principles: *The Felony-Murder Doctrine, the Felony-Murder Special Circumstance, and the Independent Felonious Purpose Rule*

Under the felony-murder doctrine, any killing "committed in the perpetration of, or attempt to perpetrate, arson [or another enumerated felony] . . . is murder of the first degree." (§ 189.) "Felony-murder liability does not require an intent to kill, or even implied malice, but merely an intent to commit the underlying felony." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 654.) "The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony. [Citation.] 'The Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof.' " (*People v. Cavitt* (2004) 33 Cal.4th 187, 197.)

In California, "only first degree murder with special circumstances is . . . punishable" by death. (*People v. Anderson* (2002) 28 Cal.4th 767, 773 (*Anderson*), citing §§ 190, subd. (a), 190.2, subd. (a).) "[S]pecial circumstances were added to the murder laws in the 1970's to conform California's death penalty law to the requirements of the United States Constitution." (*Anderson*, *supra*, at p. 775.) They do so by "narrow[ing] the pool of those eligible for death." (*People v. Gamache* (2010) 48 Cal.4th 347, 406.)

One such special circumstance is the felony-murder special circumstance, which applies where a murder "was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit," certain enumerated felonies, including arson.

(§ 190.2, subd. (a)(17)(H).) " '[T]o prove a felony-murder special-circumstance allegation, the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder.' [Citation.]" (*People v. Horning* (2004) 34 Cal.4th 871, 907.) " 'In other words, if the felony is merely incidental to achieving the murder—the murder being the defendant's primary purpose—then the special circumstance is not present, but if the defendant has an 'independent felonious purpose' (such as burglary or robbery) and commits the murder to advance that independent purpose, the special circumstance is present.' " (*Id.* at p. 908.)

As the court explained in *People v. Green* (1980) 27 Cal.3d 1, 61-62 (*Green*), overruled on another ground by *People v. Martinez* (1999) 20 Cal.4th 225, 239, the rationale for the so-called "independent felonious purpose" rule is tied to the Legislature's intent in enacting the felony-murder special circumstance. *Green* reasoned that, in enacting section 190.2, "the Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not. . . . The [felony-murder special circumstance] provision thus expressed a legislative belief that it was not unconstitutionally arbitrary to expose to the death penalty those defendants who killed in cold blood in order to advance an independent felonious purpose, e. g., who carried out an execution-style slaying of the victim of or witness to a holdup, a kidnaping, or a rape. [¶] The Legislature's goal is not achieved, however, when the defendant's intent is not to steal but to kill and the robbery is merely incidental to the murder . . . ." (*Green*, *supra*, at p. 61.)

Since 2000, by statute, the independent felonious purpose rule no longer applies to a felony-murder special circumstance based on arson. (*People v. Odom* (2016) 244 Cal.App.4th 237, 253-254 (*Odom*), citing § 190.2, subd. (a)(17)(M).) "Thus, . . . even if . . . arson is committed primarily [or solely] for the purpose of facilitating a murder, the

special circumstance may be found true." (*Odom*, *supra*, at p. 254; § 190.2, subd. (a)(17)(M) ["To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder"].)

4. Analysis

Defendant contends that the "independent felonious purpose" rule, although it was developed in the context of the felony-murder special circumstance, applies equally to the felony-murder doctrine. For that argument, he relies on California Supreme Court cases stating that, for purposes of the felony-murder doctrine, the felony must not be " 'merely incidental to, or an afterthought to, the killing.' " (*People v. Elliot* (2005) 37 Cal.4th 453, 469.)

The California Supreme Court first used the "merely incidental" language in the context of the felony-murder doctrine in *People v. Hernandez* (1988) 47 Cal.3d 315, 348 (*Hernandez*). There, the defendant argued that the felony-murder doctrine did not apply because the underlying felony—rape—was complete at the time of the homicide. (*Ibid.*) In rejecting that argument, the Supreme Court noted that, "in discussing the special circumstance of felony murder, [it had stated that] determining whether a killing had occurred in the commission of a felony is not 'a matter of semantics or simple chronology.' (*People v. Green* (1980) 27 Cal.3d 1, 60.) . . . Instead the focus is on the relationship between the underlying felony and the killing and whether the felony is merely incidental to the killing, an afterthought." (*Hernandez*, *supra*, 47 Cal.3d at p. 348.) While the Supreme Court has since repeated the "merely incidental" language in describing the felony-murder doctrine, defendant does not direct us to a single case in which a court has held that felony-murder doctrine instructions were improper because the independent felonious purpose rule was not satisfied. Thus, it is far from clear that

the Supreme Court has imported the "independent felonious purpose" rule wholesale into the felony-murder doctrine context, as defendant argues. (See *People v. Andreasen* (2013) 214 Cal.App.4th 70, 82, fn. 7 (*Andreasen*) ["We note that, for felony murder, the California Supreme Court has at times stated the felony must not be merely incidental to the killing. [Citation.] However, this principle does not appear to have been developed as a distinct requirement akin to the independent-felonious-purpose rule applied to the felony-murder special circumstance"].)

But even assuming the "independent felonious purpose" rule applies equally in the felony-murder special circumstance and felony-murder doctrine contexts, it does not apply here for two reasons. First, under section 190.2, subdivision (a)(17)(M), the independent felonious purpose rule does not apply to a felony-murder special circumstance based on arson. It would make little sense to conclude the rule nevertheless applies to the felony-murder doctrine where the underlying felony is arson. Second, in *People v. Farley* (2009) 46 Cal.4th 1053 (*Farley*), the California Supreme Court held that the merger doctrine, under which an assaultive felony merges with a homicide absent an independent felonious purpose and cannot be the basis of a felony-murder instruction, does not apply to first degree felony murder. The *Farley* court reasoned that "nothing in the language of section 189 supports the application of the merger doctrine to its terms," such that applying it to first degree felony murder would improperly "narrow[] the Legislature's clear and specific definition of first degree murder." (*Id.* at p. 1119.) The same reasoning forecloses courts from engrafting a "independent felonious purpose" rule into section 189. (*Andreasen*, *supra*, 214 Cal.App.4th at p. 82, fn. 7 ["The *Farley* decision confirms that the independent-felonious-purpose requirement is confined to the special circumstance and it does not extend to the felony-murder offense"].)

For the foregoing reasons, we conclude the trial court did not err in instructing the jury on felony murder, nor was the court's instruction incomplete.

B. Ineffective Assistance of Counsel for Failure to Object to Prosecutorial Misconduct

During his closing argument, the prosecutor argued: "Back to Dr. Froming. So the important question, of course, is, is the defendant so cognitively impaired that he's not able, or can't form, for instance, intent to kill, when he set his wife on fire, or be aware of the danger of his actions and consciously ignore it? Or is he so cognitively impaired that he can't plan or premeditate, even at the simple level that would be required for the kind of crime that occurred. And in order to answer that question, you need to look at all of the evidence. And I think when you look at all of the evidence the only reasonable conclusion or inference is, no. He was not so impaired that he couldn't form those basic intentions. Those basic state of minds that we've been talking about that refer to the crimes charged the night he killed the victim."

Defendant contends that argument misstated the law and improperly shifted the burden of proof by suggesting that it was the defense's obligation to prove diminished capacity. Defendant concedes that he did not object below to the prosecutor's argument. Accordingly, he does not raise a prosecutorial misconduct claim, but rather argues trial counsel was ineffective for failing to object.

1. Legal Principles

a. Ineffective Assistance of Counsel

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish both that his counsel's performance was deficient and that he suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) The deficient performance component of an ineffective assistance of counsel claim requires a showing that "counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms." (*Id.* at p. 688.) With respect to prejudice, a defendant

must show "there is a reasonable probability"—meaning "a probability sufficient to undermine confidence in the outcome"—"that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.) We "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Id.* at p. 697.)

b. Prosecutorial Misconduct

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' " (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).)

"It is improper for the prosecutor to misstate the law generally, and in particular, to attempt to lower the burden of proof." (*People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353.) "However, we do not reverse a defendant's conviction because of prosecutorial misconduct unless it is reasonably probable the result would have been more favorable to the defendant in the absence of the misconduct." (*Ibid.*)

"When attacking the prosecutor's remarks to the jury, the defendant must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.]' " (*People v. Centeno* (2014) 60 Cal.4th 659, 667 (*Centeno*).) "If the challenged comments, viewed in context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed

objectionable.' " (*People v. Cortez* (2016) 63 Cal.4th 101, 130.) " '[W]e "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' " (*Centeno, supra*, at p. 667.)

c. Admissibility of Mental State Evidence

The defense of diminished capacity has been abolished by statute in this state. (*People v. Mayfield* (1993) 5 Cal.4th 142, 198, fn.10; § 25, subd. (a).) Accordingly, "evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect [is] not . . . admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged." (§ 25, subd. (a).) Instead, "[e]vidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." (§ 28, subd. (a).) "[A]ny expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged." (§ 29.)

2. Analysis

Defendant argues the prosecutor's remarks misstated the law by indicating that defendant's capacity to form intent was relevant and that defendant bore the burden to establish that he lacked the requisite mental state. Defendant further contends the prosecutor implicitly criticized Dr. Froming for failing to opine as to defendant's ability to form the requisite mental state, something section 29 prohibits.

We agree with defendant that the prosecutor misstated the law by suggesting that defendant's ability to form the requisite intent or mental state was at issue, when in fact the diminished capacity defense has long been abolished in this state. But defendant has failed to establish prejudice from defense counsel's failure to object to that misstatement

of law. The remarks at issue were brief. Elsewhere in his closing argument, the prosecutor spent considerable time explaining how, in his view, the evidence established the requisite intent for first degree murder. And the jury was given a series of instructions that correctly explained the law, including CALCRIM No. 200 ("You must follow the law as I explain it to you . . . . If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions"); CALCRIM No. 521 ("The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation"); CALCRIM No. 1501 ("To prove that defendant is guilty of Arson, the People must prove that . . . [¶] . . . [¶] [the defendant] acted willfully and maliciously"); and CALCRIM No. 3428 ["You may consider . . . evidence [that the defendant may have suffered from a mental defect] only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted with the intent or mental state required for that crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted with the required intent or mental state . . ."). "In the absence of evidence to the contrary, we presume the jury understood and followed the court's instructions." (*People v. Williams* (2009) 170 Cal.App.4th 587, 635 (*Williams*).) Under these circumstances, the prosecutor's misstatement was not prejudicial and thus cannot form the foundation for an ineffective assistance claim.

C. Cumulative Error

Defendant contends the cumulative effect of the alleged errors was to deprive him of his right to due process. "Under the cumulative error doctrine, the reviewing court must 'review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.' " (*Williams*, *supra*, 170 Cal.App.4th at p. 646.) "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' " (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

Because we have found no errors, the cumulative error doctrine has no application.[3]

D. Adjudication of Oregon Convictions as Strikes

Finally, defendant argues the trial court violated state law and his Sixth Amendment right to a jury trial in concluding that his Oregon burglary and robbery convictions qualify as strikes under California law. We find no error.

1. Legal Principles

"California's 'Three Strikes' law requires criminal sentences to be increased when a defendant has been convicted of one or more prior serious or violent felonies, or 'strikes.' " (*People v. Saez* (2015) 237 Cal.App.4th 1177, 1193 (*Saez*).) "A qualifying strike includes '[a] prior conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison . . . if the prior conviction in the other jurisdiction is for an offense that includes all of the elements of a particular . . . serious felony as defined in subdivision (c) of Section 1192.7.' " (*Ibid.*, quoting § 667, subd. (d)(2).) Among the serious felonies listed in section 1192.7, subdivision (c) are first degree burglary and robbery. (§ 1192.7, subds. (c)(18) & (c)(19)).)

"[U]nder California law it is *the court*, rather than *the jury*, that is entrusted with the responsibility of" determining whether a prior conviction qualifies as a strike. (*People v. McGee* (2006) 38 Cal.4th 682, 685 (*McGee*).) In making that determination, our Supreme Court has held that the trial court may examine the entire record of conviction "to determine the nature or basis of the crime of which the defendant was convicted." (*Id.* at p. 691.) The court's focus ought to be "on the elements of the offense

[3] While we conclude the prosecutor committed misconduct by misstating the law in closing argument, defendant raises that issue only in the context of an ineffective assistance of counsel claim based on trial counsel's failure to object. We reject that challenge on the ground that defendant has not established prejudice.

of which the defendant was convicted. If the enumeration of the elements of the offense does not resolve the issue, an examination of the record of the earlier criminal proceeding is required in order to ascertain whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law. [Citation.] The need for such an inquiry does not contemplate that the court will make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct [citation], but instead that the court simply will examine the record of the prior proceeding to determine whether that record is sufficient to demonstrate that *the conviction* is of the type that subjects the defendant to increased punishment under California law." (*Id*. at p. 706.) The trial transcript is part of the record of conviction (*People v. Bartow* (1996) 46 Cal.App.4th 1573, 1580 (*Bartow*)), while police reports generally are not (*Draeger v. Reed* (1999) 69 Cal.App.4th 1511, 1521, 1523; *People v. Perez* (2016) 3 Cal.App.5th 812, 821-822 (*Perez*)). "Even when an item is part of the record of conviction, it is not automatically relevant or admissible for a particular purpose. [Citations.] Its admission must comport with the rules of evidence, particularly the hearsay rule and exceptions thereto." (*Perez, supra*, at pp. 821-822, fn. 9.)

Federal Constitutional principles, including the Sixth Amendment right to a jury trial, require that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum . . . be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*).) However, under *Apprendi*, that general rule does not apply to "the fact of a prior conviction." (*Ibid*.) The *McGee* court concluded that California's approach, under which the court examines the record of a prior conviction to determine whether that conviction constitutes a strike, does not run afoul of *Apprendi* because it falls within the fact-of-a-prior-conviction exception. (*McGee, supra*, 38 Cal.4th at p. 709.) *McGee* acknowledged "the possibility that the United States Supreme Court, in future decisions, may extend the *Apprendi* rule,"

applying it "to the inquiry involved in examining the record of a prior conviction to determine whether that conviction constitutes a qualifying prior conviction for purposes of a recidivist sentencing statute." (*Ibid*.) But the *McGee* court declined to assume "that the federal constitutional right to a jury trial will be interpreted to apply in [that] context." (*Ibid*.)

In 2013, several years after *McGee* was issued, the United States Supreme Court decided *Descamps v. United State* (2013) 570 U.S. __, [133 S.Ct. 2276] (*Descamps*). *Descamps* addressed how a sentencing court should determine whether a prior conviction qualifies as a violent felony under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), which increases sentences of federal defendants with three such prior convictions. (*Descamps, supra*, at p. __ [133 S.Ct. at p. 2281].) The *Descamps* Court endorsed a "categorical approach," under which the sentencing court "compare[s] the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood. The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense." (*Ibid*.) "[W]hen a prior conviction is for violating a so-called 'divisible statute[,]' . . . [one that] sets out one or more elements of the offense in the alternative[,] . . . the [so-called] modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction. The court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime." (*Ibid*.) The Court noted that under either approach, the "focus [is] on the elements, rather than the facts, of a crime." (*Id.* at p. __ [133 S.Ct. at p. 2285].)

The *Descamps* Court offered three justifications for its "elements-centric" approach: (1) the ACCA's text and history, (2) avoidance of the "Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly

belong to juries," and (3) " 'the practical difficulties and potential unfairness of a factual approach.' " (*Descamps, supra,* 570 U.S. at p. __ [133 S.Ct. at p. 2287].) With respect to the Sixth Amendment, the Court stated that because a sentencing "court's finding of a predicate offense indisputably increases the maximum penalty," such a "finding would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction." (*Descamps*, *supra,* at p. __ [133 S.Ct. at p. 2288].) In the Court's view "[t]hose [Sixth Amendment] concerns . . . counsel against allowing a sentencing court to 'make a disputed' determination 'about what the defendant and state judge must have understood as the factual basis of the prior plea,' or what the jury in a prior trial must have accepted as the theory of the crime." (*Ibid*.) The Court criticized the Ninth Circuit's approach, which "authorize[d] the [sentencing] court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct," explaining that "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances. [Citation.] Similarly, . . . when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment." (*Ibid*.)

In a dissent, Justice Alito expressed the view that there would be no Sixth Amendment violation if "a judge applying ACCA . . . determin[es], not what the defendant did when the [crime] in question was committed, but what the jury in that case necessarily found or what the defendant, in pleading guilty, necessarily admitted . . . ." (*Descamps, supra,* 570 U.S. at p. __ [133 S.Ct. at p. 2300] (dis. opn. of Alito, J.).)

The Court revisited the issue of how sentencing courts determine whether a prior conviction constitutes an ACCA predicate in *Mathis v. United States* (2016) 579 U.S. __,

[136 S.Ct. 2243] (*Mathis*). In affirming the approach laid out in *Descamps*, the Court stated that, under the Sixth Amendment and *Apprendi*, "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. [Citations.] . . . He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." (*Mathis*, *supra*, at p. __ [136 S.Ct. at p. 2252].) But only Chief Justice Roberts and Justices Kagan, Sotomayor, and Thomas agreed on that point. Justice Kennedy concurred but wrote separately to express his view that *Apprendi* "does not compel the elements based approach. That approach is required only by the Court's statutory precedents, which Congress remains free to overturn." (*Id*. at p. __ [136 S.Ct. at p. 2258] (conc. opn. of Kennedy, J.).) Justice Breyer, in a dissent joined by Justice Ginsburg, concluded that, in certain circumstances, *Apprendi* permits a sentencing court to look beyond the elements of the crime of conviction to determine whether a prior conviction constitutes an ACCA predicate. (*Mathis*, *supra*, at pp. __ [136 S.Ct. at pp. 2260, 2265] (dis. opn. of Breyer, J.).) For example, where the statute at issue is broader than the federal version of the crime, the sentencing court may look to the charging documents; if they "make clear that the state alleged (and the jury or trial judge necessarily found) only an alternative that matches the federal version of the crime," then the prior conviction may be counted as an ACCA predicate. (*Mathis*, *supra*, at p. __ [136 S.Ct. at p. 2266] (dis. opn. of Breyer, J.).) Justice Alito maintained the view he expressed in *Descamps*: the elements-based approach "is not required by . . . the Sixth Amendment . . . ." (*Id*. at p. __ [136 S.Ct. at p. 2271, fn. 4] (dis. opn. of Alito, J.).)

The California Supreme Court has not yet considered the effect of *Descamps* and *Mathis* on California's approach to determining whether an out-of-state prior conviction

qualifies as a serious felony.[4] In *People v. Wilson* (2013) 219 Cal.App.4th 500, 516, this court considered *Descamps* and held "only that federal law prohibits what *McGee* already proscribed: A court may not impose a sentence above the statutory maximum based on disputed facts about prior conduct not admitted by the defendant or implied by the elements of the offense." Some of our sister Courts of Appeal have gone further. For example, in *People v. Marin* (2015) 240 Cal.App.4th 1344, 1348-1349, the Second District held that, "under *Descamps*, judicial factfinding authorized by [*McGee*], going beyond the elements of the crime to 'ascertain whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law' [citation], violates the Sixth Amendment right to a jury trial . . . ." In *People v. Navarette* (2016) 4 Cal.App.5th 829, 855, the Fifth District read *Descamps* to mean that the Sixth Amendment does not permit a sentencing court to "go beyond the elements of the [prior] offense in determining whether the offense coincided with a serious felony in California." And the First District has concluded that "the reasoning of *Descamps* leads ineluctably to the conclusion that a judicial strike and serious felony determination based on the record of a prior conviction contravenes the Sixth Amendment insofar as it rests on facts beyond the elements of the conviction, unless the defendant waives a jury as to those facts and either admits them or assents to the court's finding them." (*People v. Eslava* (2016) 5 Cal.App.5th 498, 514.)

2. State Law Analysis

a. Oregon Burglary

As the trial court concluded following a bench trial on priors, the elements of first

[4] Our Supreme Court is currently considering that issue in *People v. Gallardo*, S231260 (review granted Feb. 17, 2016), which presents the following issue: Was the trial court's decision that defendant's prior conviction constituted a strike incompatible with *Descamps*, *supra*, 570 U.S. at p. __ [133 S.Ct. at p. 2276] because the trial court relied on judicial fact-finding beyond the elements of the actual prior conviction?

degree burglary under Oregon law (Or. Rev. Stat., § 164.225) differ from the elements of that offense under California law (§§ 459-460). The elements of first degree burglary under Oregon law are (1) entering or remaining unlawfully in a building (2) with intent to commit a crime therein and (3) "the building is a dwelling, or if in effecting entry or while in a building or in immediate flight therefrom the person: [¶] (a) Is armed with a burglary tool or theft device as defined in ORS 164.235 or a deadly weapon; [¶] (b) Causes or attempts to cause physical injury to any person; or [¶] (c) Uses or threatens to use a dangerous weapon." (Or. Rev. Stat., §§ 164.225, 164.215.) "The elements of first degree burglary in California are (1) entry into a structure [(2)] currently being used for dwelling purposes . . . ([3]) with the intent to commit a theft or a felony." (*People v. Sample* (2011) 200 Cal.App.4th 1253, 1261.) The Oregon statute under which defendant was convicted is broader than California's first degree burglary statute in two ways. First, it requires intent to commit *any* crime, while California law requires intent to commit *a theft or a felony*. Second, under Oregon law, the entered structure need not be *currently being used* for dwelling purposes as it must under California law. (See *State v. Ramey* (1988) 89 Or.App. 535, 539 [Oregon law defining "dwelling" for purposes of Or. Rev. Stat. § 164.225 "does not require that at the time of the entry there must be an identifiable person using or authorized to use the building as sleeping quarters, either regularly or intermittently…"]; cf. *People v. Valdez* (1962) 203 Cal.App.2d 559, 563 [burglary of rental unit where no one resided was not first degree burglary because unit was uninhabited].)

Given the statutory disconnect, the sentencing court examined the record of the conviction, which it determined to include the indictment, the judgment of conviction, a "Petition to Waive Jury Trial and Try the Case to the Court Upon Stipulated Facts" signed by defendant, and the police report. The indictment accused defendant of "unlawfully and knowingly enter[ing] a dwelling . . . with the intent to commit the crime of theft therein . . . ." The petition states, among other things, "I waive trial by jury and

stipulate to the facts and request the court to accept my waiver and stipulation and to enter my waiver and stipulation on that basis that in Multnomah County, Oregon (write in facts and dates) I stipulate that the State would bring in evidence consistent with the police reports if this case went to trial." The judgment of conviction states "it is adjudged that defendant has been convicted on defendant's plea of . . . not guilty and finding of guilty, by court trial. ([S]tip[.] facts[.])" The police report states that the victim was returning to his apartment when he observed the defendant in the hallway with the victim's bicycle, which had been in the apartment. The court concluded that the police report was part of the record of conviction because it was "the basis for the court's finding of guilt and, importantly, the defendant stipulated that the State would bring in evidence consistent with the police report such that defendant waived his Sixth Amendment right to confront and cross-examine."

Based on the indictment, the court below concluded that the intent to commit theft element of first degree burglary under California law was satisfied. And the court determined from the police report that the inhabited dwelling element was satisfied. Accordingly, the court concluded that defendant's Oregon burglary conviction qualified as a strike for purposes of the Three Strikes Law.

Defendant contends the trial court erred under *McGee* in considering the police report. His argument appears to be two-fold: the police report was not part of the record of conviction and constituted inadmissible hearsay. We disagree on both counts.

Defendant is correct that, ordinarily, police reports are not part of the record of conviction. (*Perez, supra,* 3 Cal.App.5th at p. 822, fn. 9.) But, here, the sole factual basis for defendant's burglary conviction was his stipulation "that the State would bring in evidence consistent with the police reports if this case went to trial." That stipulation authorized the Oregon trial court to consider the police report as evidence of guilt. Had the burglary victim and responding officers testified, the trial transcript would have been part of the record of conviction. (*Bartow, supra,* 46 Cal.App.4th at p. 1580 [trial

transcript is part of the record of conviction].) We have little trouble concluding that the police report stipulated to in lieu of such live testimony likewise is part of the record of conviction. (See *Saez, supra,* 237 Cal.App.4th at p. 1198, fn.18 [police officer's sworn statement held to be part of the record of conviction where defendant stipulated to the statement as the factual basis for his plea because "the officer's statements became evidence of the basis of the conviction"].)

"The normal rules of hearsay generally apply to evidence admitted as part of the record of conviction to show the conduct underlying the conviction." (*People v. Woodell* (1998) 17 Cal.4th 448, 458.) Here, defendant waived any hearsay objection to the police report by stipulating that the court could consider its contents as evidence. (*Switzer v. Mullally* (1935) 7 Cal.App.2d 444, 446 [defendant waived hearsay objection to doctor's autopsy report that "was read into evidence, under a stipulation that it might be so read to avoid the necessity of the personal appearance of the doctor in court"].) Defendant notes that he did not stipulate to the truth of the facts in the police report, only that the State would produce evidence consistent with those facts. We agree, but that nuance does not impact our analysis. What matters here is that, for purposes of a court trial, defendant stipulated to the court's consideration of the contents of the police report in lieu of live testimony. In doing so, he plainly waived any hearsay objection.

For the foregoing reasons, we conclude that, under the circumstances of this case, the trial court did not commit state law error by considering the police report as part of the record of conviction.

b. Oregon Robbery

The trial court concluded that the elements of third degree robbery under Oregon law (Or. Rev. Stat., 164.395) differed from the elements of robbery under California law (§ 211). We agree. The elements of third degree robbery under Oregon law are (1) in the course of committing or attempting to commit theft (2) the person uses or threatens the immediate use of physical force upon another person with the intent of (3) preventing or

overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft. (Or. Rev. Stat., 164.395) The elements of robbery in California are (1) the felonious taking of personal property in the possession of another, (2) from his person or immediate presence, and (3) against his will, (4) accomplished by means of force or fear. (§ 211.) In California, "[a] theft becomes a robbery if the property of another was 'peacefully acquired, but force or fear was used' in carrying the property away." (*People v. Hudson* (2017) 11 Cal.App.5th 831, 838.) The Oregon law is broader than the California law, as it does not require the actual taking of personal property (attempted theft is sufficient) or that the property be taken from a person's immediate presence.

The trial court again looked to the record of conviction. The court determined that the record of conviction included a jury trial waiver signed by defendant, a transcript of the bench trial, and a Trial Order stating "[a]fter receiving evidence and hearing the arguments of counsel, . . . the court hereby FINDS said defendant GUILTY of the lesser, included offense of ROBBERY IN THE THIRD DEGREE." The trial transcript shows a gas station employee testified that defendant tried to buy a pack of cigarettes and two 40-ounce bottles of beer. The employee testified that defendant did not have enough money for the purchase so, after arguing with the cashier, he "grabbed the beer and walked out." The employee followed the defendant and told him to return the beer because he had not paid for it. According to the employee, defendant pushed him. Defendant testified that he tried to buy a pack of cigarettes and two 40-ounce bottles of beer but did not have enough money. He and the cashier got into a verbal altercation when she refused to give him the items and let him return to pay the balance of the bill the following day. Defendant admitted to taking the beers off the counter, walking out of the gas station, and throwing the beers into the garbage. He denied pushing the gas station employee who told him to return the beers. In finding defendant guilty of third

degree robbery, the Oregon trial court judge credited the employee's testimony that defendant pushed him, stated that he "found the defendant not very credible," and found "the immediate use of physical force to prevent the taking of the property."

Below, the trial court concluded that the Oregon robbery trial transcript "establishes defendant . . . committed a robbery as defined in California: a felonious taking of personal property in the possession of another from his person or immediate presence (taking of beer from the store in front of the clerk), and against his will, accomplished by means of force or fear (pushing the store clerk)."

Defendant contends that the record of conviction does not establish he had the requisite intent for the conviction to be a strike. We disagree.

Defendant acknowledges that our colleagues in the First District concluded in *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1446 that the intent necessary for theft in both California and Oregon is the common law larceny requirement of intent to permanently deprive.[5] He does not argue that decision was wrongly decided and we find it persuasive. In convicting defendant of third degree robbery, the Oregon trial court necessarily concluded that he had the requisite intent for that crime, which is the intent required for robbery in California. For that reason, defendant's argument fails.

3. Federal Law Analysis

We turn now to defendant's federal constitutional argument: that the Sixth Amendment prohibits sentencing courts from looking beyond the elements of a prior conviction to determine whether it constitutes a serious or violent felony under the Three

[5] In both states, the intent required for robbery is the intent required for theft. (*Rodriguez v. Superior Court* (1984) 159 Cal.App.3d 821, 826 [" ' "the felonious intent requisite to robbery is the same intent common to those offenses that, like larceny, are grouped in the Penal Code designation of 'theft.' " ' "]; (*State v. Skaggs* (1979) 42 Or.App. 763, 765-766 ["[t]he crime of robbery . . . [requires] intent to commit theft, . . . [which] is present where there is intent to dispose of property 'under such circumstances as to render it unlikely that an owner will recover such property.' "].)

Strikes law. Defendant contends that *Descamps* and *Mathis* compel the foregoing conclusion. We are unconvinced.

As discussed above, in *Mathis*, four Justices expressed the belief that the elements-based approach set forth in *Descamps* is constitutionally required. (*Mathis*, *supra*, 579 U.S. at p. __[136 S.Ct. at p. 2252].) But four others expressly rejected that view. (*Id*. at p. __ [136 S.Ct. at p. 2258] ["*Apprendi* . . . does not compel the elements based approach. That approach is required only by the Court's statutory precedents, which Congress remains free to overturn."] (conc. opn. of Kennedy, J.); *id*. at p. __ [136 S.Ct. at pp. 2263-2266] (dis. opn. of Breyer, J., joined by Ginsburg, J.); *id*. at p. __ [136 S.Ct. at p. 2271, fn. 4] (dis. opn. of Alito, J.). Justice Gorsuch has yet to weigh in on the issue. This is not to say that *Descamps* is not the law of the land; it is. But that case was decided in the context of the ACCA; it did not overrule *McGee*. And *Mathis* casts significant doubt on whether the United States Supreme Court would deem California's approach, as set forth in *McGee*, to be violative of the Sixth Amendment. Given the current jurisprudential uncertainty, we cannot conclude it would. *McGee* remains the law in California and we decline defendant's invitation to depart from that precedent. Accordingly, we find no federal law error.

III. DISPOSITION

The judgment is affirmed.

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ELIA, ACTING P.J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.